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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

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## No. .....

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JESSE J. PARKERSON, TRUSTEE; MERCHANTS & PLANTERS BANK, a corporation; and HIDUD CORPORATION, a corporation,

*Petitioners,*

v.

WILLIAM R. CHAPMAN, III, and HARRIETT C. PIERIE, Executors and Testamentary Trustees under the Will of William R. Chapman, Jr., Substituted Parties Plaintiff,

*Respondents*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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*To: The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners, Jesse J. Parkerson, Trustee; Merchants & Planters Bank, a corporation; and Hidud Realty Corporation, a corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this cause on January 4th, 1950, affirming the judgment of the United States District Court for the Eastern District of Virginia at Norfolk, entered on May 24th, 1949, which judgment was in favor of respondents.

## STATEMENT OF MATTERS INVOLVED

The suit was brought by William R. Chapman, Jr., and Harriett C. Pierie, residents of Philadelphia, Pa., Plaintiffs, against Jesse J. Parkerson, Trustee; Merchants & Planters Bank, a corporation; and Hidud Realty Corporation, a corporation, and against Charles Forney and several corporations of which he was the ruling spirit.

During the pendency of the suit and after the Court had announced its decision, but before the entry of final judgment, William R. Chapman, Jr., died, and an order was entered on the 24th day of May, 1949, substituting the present parties respondent.

The plaintiffs claimed in substance that certain real estate was conveyed by the plaintiff, William R. Chapman, Jr., to the other plaintiff, his daughter, who was then married to Charles Forney and who later married Pierie. The deed was complete on its face and conveyed fee simple title. The plaintiffs claimed that there was a parol understanding for her to give a deed of trust thereon to the Merchants & Planters Bank to secure certain loans; the property to be held by the grantee as Trustee for the grantor subject only to the deed of trust, and further claimed the bank had not properly accounted for certain rent and fire insurance monies collected by it; that later the property was sold by special commissioners under foreclosure proceedings instituted in the Circuit Court of Princess Anne County, Va., which sale at public auction was stopped on the petition of Charles Forney and his corporations, and the private offer of Hidud Realty Corporation at an inadequate price was accepted by the

Court; that purchaser, Hidud Realty Corporation, had notice of the alleged trust. The prayer was that the bank be required to account to Chapman for monies collected and that title in defendant Hidud Realty Corporation be declared subject to trust in Chapman. There were other claims, but the case was tried on these points. The District Court found that plaintiff Harriett C. Pierie and defendant Charles Forney and his several corporations had no interest in the proceedings, and they were dismissed, and entered final judgment against the bank for part of the fire insurance money, and title was required to be transferred back to Chapman subject to the payment by him to Hidud Realty Corporation of the purchase price and for improvements made on the realty by Hidud Realty Corporation.

On page 12 of the opinion (R. 162) rendered by the Circuit Court of Appeals it is stated: "That the District Judge concluded that the evidence in the pending case was sufficient to support findings that Chapman and his daughter had an agreement at the time of the execution of his deed to her on July 16th, 1938; that the conveyance was made for the specific purpose of enabling her to borrow funds or establish credit in an amount not exceeding $10,000.00, to be secured by a deed of trust on the property, hence the deed did not convey fee simple title but was in trust for the purpose stated." In this statement the Court of Appeals is in error. The District Judge was requested to find (a) the exact language of the declaration of the trust; (b) the exact date that the declaration of the trust was made; (c) the name of the person who made the declaration of trust; (d) the name of the beneficiary, and if more than one, the interest of each. The District

Judge ignored the request and in his memorandum opinion the following five lines is the only reference made to the proof of a trust: (R. 31) "Considering the questions in the order stated, it is alleged by Chapman and conceded by Mrs. Pierie, that the deed conveying Glen Rock was executed for a specific purpose and was in fact for the establishment of a trust. This not being denied, must be accepted so far as those two parties are concerned." Mr. Chapman alleged a trust but he did not give any testimony which proves a trust, and the allegation is not proved. Mrs. Pierie could not at the trial concede what was to her interest to prove in favor of her father, who was also co-plaintiff, and against a stranger purchaser for value after she had divested herself of all her own interest in the property. Only the plaintiffs were present when the deed was delivered and the inability of the defendants to deny the existence of any trust does not excuse the strict proof thereof. The District Court misunderstood the heavy duty imposed under the Virginia law for an express trust to be proved in contradiction of the terms of an absolute deed, and the Court of Appeals has therefore based its opinion on the misconception of what the District Court actually found, and the District Court was clearly unsound in its findings.

The Court of Appeals in its decision refers to the leading cases in Virginia on the establishment of a parol trust in real estate, in which cases the law is clearly discussed and there is no doubt that in order to establish such a trust the declaration must be unequivocable and explicit, and the proof of such declaration must be clear, cogent and convincing. It is also well established that the declaration must be made at or before the delivery

of the deed in question. In spite of this law the Court of Appeals, on page 13 of the opinion (R. 162) states: "Chapman testified in effect * * *". This clearly is a misunderstanding of the law of Virginia, and is in direct conflict with the meaning of the words unequivocable and explicit. Then the Court goes on in its opinion, on page 13 (R. 162), and says: "It is true that his testimony taken on December 3rd, 1945, when he was in ill health, does not establish with precision." This is exactly what the Virginia law requires. The declaration of the trust must be proved, not in effect, but so there can be no doubt. In other words, the proof must be with precision, and if it is not established with prevision, the proof does not meet the test required by the law of Virginia.

The Court then on the same page, goes on to refer to unrecorded instruments and instruments not in the chain of title, all of which would not be notice. This opinion is in direct conflict with the law of Virginia as announced by the Supreme Court of Virginia, and is a fundamental decision, and as it now stands will cause great confusion in the real estate law in Virginia. Since the Federal Court is interpreting the law of Virginia one way and the Supreme Court of Virginia is interpreting the law another way, makes this case a proper case to be considered and settled by this Court.

This decision so substantially affects the title to real estate in Virginia that this Court is asked to review it.

## QUESTIONS PRESENTED

1. Was it error for the Court of Appeals to hold that a trust was established in the real estate involved in this litigation?

2. Was it error for the Court of Appeals to hold that the respondents were not estopped to set up such a trust, even if established?

3. Was it error for the Court of Appeals to hold that Hidud Realty Corporation had constructive notice thereof?

4. Was it error for the Court of Appeals to hold that Merchants & Planters Bank had constructive notice thereof?

5. Was it error for the Court of Appeals to hold that the bank had not properly accounted for the funds coming into its hands?

6. Was it error for the Court of Appeals to hold that Charles Forney was the agent for Chapman and Mrs. Forney?

## STATEMENT OF JURISDICTION

This Court has jurisdiction to consider and grant this petition under Title 28 U.S.C.A., 1332. The judgment of the Court of Appeals was entered on January 4th, 1950. A stay was granted on March 2nd, 1950.

## SPECIFICATIONS OF ERROR

1. In affirming the United States District Court for the Eastern District of Virginia.

2. In holding that the property in question was conveyed in trust.

3. In deciding questions of substantive law not in conformity with the law of the State where the real estate in question was located.

4. In holding that the bank had not properly accounted for the funds coming to is under the terms of the deed of trust.

5. In holding that Hidud Realty Corporation had constructive notice of the trust.

6. In holding that the bank had notice of the trust in the foreclosure suit proceedings, which was after the bank had distributed the funds questioned and was too late to rectify this situation.

7. In failing to hold that Charles Forney was the agent for Chapman, his father-in-law, and Mrs. Forney, his wife.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals that a trust was established is a fundamental decision and is contrary to the decisions of the Supreme Court of Appeals of the State of Virginia.

2. The decision of the Court of Appeals is an important question of local law and has been decided in a way to conflict with applicable local decisions.

WHEREFORE, your petitioners pray that your Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the judgment of that Court herein; that the judgment of that Court be reversed and such further relief as to this Court may seem proper.

Respectfully submitted,

RUSSELL T. BRADFORD
ALVAH H. MARTIN
BERTRAM S. NUSBAUM
*Attorneys for Petitioners*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

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## No. .....

---

JESSE J. PARKERSON, TRUSTEE; MERCHANTS & PLANTERS BANK, a corporation; and HIDUD CORPORATION, a corporation,

*Petitioners,*

v.

WILLIAM R. CHAPMAN, III, and HARRIETT C. PIERIE, Executors and Testamentary Trustees under the Will of William R. Chapman, Jr., Substituted Parties Plaintiff,

*Respondents*

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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A summary of the matters involved in this application, a statement of this Court's jurisdiction and a specification of errors in the Court below all appear sufficiently in the petition to which this brief is appended.

Petitioners' brief is framed in sections pointing to substantial error in the principal conclusion reached by the Court of Appeals, which may be summarized as follows: (1) The Court erred in finding a trust under the

Virginia law; (2) respondents are estopped to set up such a trust even if established; (3) it was error to hold Hidud Realty Corporation had constructive notice of a trust; (4) it was error to hold that the band had notice of a trust; (5) it was error to hold that the bank had not properly accounted for the funds; (6) strange development; (7) it was error to fail to find that Forney was the agent for Chapman; (8) errors one of law; (9) conclusion.

## I.

### The Court Erred in Finding a Trust Under the Virginia Law

#### (a) FACTS)

If there is a trust in this case, it is an express trust. To create an express trust there must be a declaration of the donor creating the trust, or a declaration of someone else agreed to by the donor, and in this case the agreement as to the trust had to be made prior to or simultaneously with the delivery of the deed. The evidence in this case is clear that there were only two people present when the deed was delivered, the daughter, Mrs. Forney, and the father, Mr. Chapman. The daughter, Mrs. Forney, said (R. 67): "* * * My father cautioned me against signing anything whereby I would render myself liable to anything or maybe lose the property. * * *" This is the only time that she testified as to what her father said in connection with the making and delivery of the deed. This is no more than a normal and usual warning of a parent who is transferring property to his child. The deposition given by the father was conflicting and in fact just the opposite of unequivocal (R. 5).

## (b) LAW

It is horn-book law in Virginia that you may have a parol trust in real estate and that the burden of proof required in connection therewith is quite different from that required in the ordinary civil case. The courts in Virginia have uniformly held that the declaration of a trust must be unequivocal and explicit and the proof thereof must be clear and convincing, and some of the cases add the word cogent in connection with the proof. The following case will show how strict the Virginia courts are in connection with the burden of proof in the establishing of parol trusts that will overcome grantee's title absolute on the face of the deed: *Jesser v. Armentrout,* 100 Va., 666; 42 S.E. 681. It is said: "If a parol trust can be created in lands, the declaration should be unequivocal and explicit and established by clear and convincing testimony." Authorities without end could be multiplied on that point. See also *Powers v. Long,* 131 Va. 284, 108 S.E. 664; *Hunter v. Bain,* 153 Va. 165, 149 S.E. 467; *Broaddus v. Gresham,* 181 Va. 725, 26 S.E. 2d, 33; *Brame et al v. Read et al,* 136 Va. 219, 118 S.E. 117.

The Virginia courts are strict in requiring that the proof be in accordance with the law as announced. Some courts outside of Virginia in dealing with the identical question have made the following observation:

In *Vaughan's Estate,* 250 N.Y. 197, the Court says:

> "To constitute trust, words relied on must be unequivocal. The word unequivocal means free from doubt, and its connotation is capable of being understood in only one way, as signifying without doubt, without room to doubt, and it is a stronger expression than 'beyond all reasonable doubt'."

In *Berry v. Maywood Mutual Water Company No. 1* (Cal.), 52 P. 2nd, 1032, the Court says:

> "Instruction that where plaintiff sues for attorney's fees for services performed, defendant interposing defense of special contract has burden of proving such contract, and defendant's proof must be clear and unequivocal, held error. The word unequivocal is defined as capable of being understood in only one way or as clearly demonstrated, free from uncertainty or without doubt, and when used with reference to the burden of proof it implies proof of the highest possible character, and it imports proof of the nature of mathematical certainty."

In *Molyneux v. Twin Falls Canal Company* (Idaho), 35 P. 2nd 651, the word unequivocal has also been construed. Unequivocal is defined as clear, sincere, plain, not equivocal, doubtful or ambiguous, and as implying proof of the highest possible character, or of the nature of mathematical certainty.

Actually no trust has been established under the requirements of the Virginia law, and in fact the District Court did not find one from the evidence but did find a trust, basing its findings on the allegation of one of the plaintiffs and the admission of the other plaintiff. Such a finding would be unsound if we were dealing with the ordinary burden of proof, and is clearly in error when considered in view of the facts and law of this case. It is fundamental law that the allegation in a pleading is no part of the proof. It was also error in another respect, for the allegation and admission occurred many years after the delivery of the deed, and the creation of the trust, if one was created, it had to be established as exist-

ing prior to or simultaneously with the delivery of the deed. So clearly the Court of Appeals was wrong when in rendering its opinion it is stated on page 12 of the opinion (R. 162): "The District Judge concluded that evidence in the pending case was sufficient to support the findings that Chapman and his daughter had an agreement. * * *" The District Judge actually found (R. 31), "* * * It is alleged by Chapman and conceded by Mrs. Pierie, that the deed conveying Glen Rock was executed for the specific purpose and was in fact for the establishment of a trust. This not being denied must be accepted so far as those two parties are concerned." This is the only reference made to the proof of a trust in the District Court opinion. It is, therefore, impossible to come to but one conclusion, and that is that no trust has been established. Undoubtedly the back-stage relationship between the father and daughter was one of debtor and creditor, which relationship is distinguished from a fiduciary relationship. (*Broaddus v. Gresham,* 181 Va. 725, 26 S.E. 2d 33).

## II.

### Respondents Are Estopped to Set Up Such a Trust, Even If Established

We think it is clear from the record in this case that by the action of Mr. Chapman and by his failure to act when he should have acted, he is estopped to set up a trust.

The situation presented is of a father experienced in business, giving a deed absolute on its face, to an inexperienced daughter, whose husband had already lost

heavily by mismanagement of the business. According to respondents' theory, the deed was given for the purpose of obtaining credit from the bank. Knowing all these circumstances, we believe Chapman was, therefore, required to give notice to the bank of any limitation of authority. In the absence of such notice, at least Chapman would incur an extraordinary duty on the first indication of trouble to act for the protection of third persons, but Chapman never communicated with the bank. A fire occurred in 1940, known to him, while his daughter was living with him at his home, from which insurance money was collected, and he took no steps to direct the application thereof and made no claim to it. Later in 1940 the property was leased to Princess Anne Corporation and subleased to Norfolk Tidewater Terminals, all in violation of the alleged trust, the papers were signed at his home and with his knowledge, yet he took no steps to disclose his interest in the property. There is no indication that Chapman was the real beneficial owner. If so, why did he not carry the insurance? Mrs. Forney testified that her father knew of the pendency of the Princess Anne suit but took no steps to protect his interests. Having failed to assert a right when the sale was imminent, he should not be allowed to attack the title of a purchaser for value because he was not a party to the suit. Nusbaum, the attorney who examined the title for Hidud, wrote to Chapman, clearing disclosing that he was searching title for a purchaser, while the son, William R. Chapman, III, opened the letter, knew that it was intended for his father, and replied t oNusbaum, using his father's name, fully co-operating in the consummation of the sale. Under the circumstances, Nusbaum was fully justified in passing the title.

The latest Virginia case we have been able to find which is a case dealing with parol trust in real estate, is that of *Wren et al v. Tate et al,* decided by the Supreme Court of Appeals of Virginia on January 16th, 1950, and is reported in 57 S.E. 2d 48, Advance Sheet No. 2, under date of February 9th, 1950. The same test that has been applied in earlier cases is still followed. The court held that under the facts of that case the evidence did not measure up to the required degree of proof, and decided against the establishing of the trust. In addition thereto, the court said on page 54:

> "In addition to what has been said, it seems to us that the defense of laches constitutes a complete bar to the assertions now being made by the appellants. After sleeping on their rights for nearly thirty years after the contract was made, with knowledge of their rights, and after the death of Tate, they, for the first time, when they instituted this suit, assert the rights they now claim. It is too late for them to do so." (Citing cases)

In like manner the respondents are estopped to set up a trust at this late date. Chapman knew there were no restrictions in the deed. He knew the daughter was handling the property as though it were her own. He knew a foreclosure suit was instituted yet he took no steps to protect himself. If the transfer in 1938 was as alleged, to secure a loan, then he should have required an immediate transfer back to himself subject to the loan. Because of the conduct of Chapman, the respondents are estopped to set up any rights, if they had any, which we sincerely maintain have never been established.

## III.

### It Was Error to Hold Hidud Realty Corporation Had Constructive Notice of a Trust

We earnestly maintain that the only possible notice chargeable to Hidud was contained in the first paragraph of the bill of complaint filed in the Circuit Court of Princess Anne County, Va. The purpose of this suit was to enjoin foreclosure. There was an allegation in paragraph 1 that Mrs. Forney was holding the property under a declaration of trust for the Medical Arts Company of Philadelphia, Pa., but in the reference to a commissioner no relief was asked on behalf of the Medical Arts Company of Philadelphia, Pa. Then later the identical parties who had signed the bill of complaint, namely Charles Forney, Princess Anne Corporation, Princess Anne Clothespin Corporation, Profile Timber Corporation and in addition thereto the Princess Anne Tobacco Storage Corporation, and Hidud Realty Corporation asked for a private sale of the property to Hidud Realty Corporation. The first paragraph thereof reads as follows:

> "1. This is a suit to determine the state of indebtedness between the original parties plaintiff or debtors, and the defendant Merchants and Planters Bank. * * *
>
> 7. During the progress of the trial, Harriett Chapman Forney, owner of record of the real property which the defendants are about to sell at foreclosure, has conveyed said title to Princess Anne Tobacco Storage Corporation subject to any indebtedness to the Merchants and Planters Bank, and secured on real property by the said Harriett Chapman Forney.

> The petitioner, Hidud Realty Corporation, by agreement with Princess Anne Tobacco Storage Corporation and all and every plaintiff to this cause * * *. The only condition to the purchase by the Hidud Realty Corporation being that it would obtain fee simple title."

The petition was dated July 22nd, 1943, and filed July 23rd, 1943. It can be easily seen that the entire suit was considered one of accounting, and the same parties who inserted in their bill of complaint an isolated statement of an outstanding equity in favor of Medical Arts Company, themselves retracted the statement by signing the petition last above referred to. Nusbaum afterward wrote to Chapman in connection with the form of the deed to the purchaser Hidud. The letter was written on July 27th, 1943, and on July 29th, a wire was received addressed to Mr. Nusbaum reading as follows: "Am unable to obtain signature until tomorrow" and signed William R. Chapman. Mr. Nusbaum next received an undated telegram, which was presumably sent on July 30th, which read as follows: "Mailing executed papers today." This telegram was signed William R. Chapman. Afterward Mr. Nusbaum received the executed deed. Then he addressed another letter to William R. Chapman, Esq., 1429 Federal Street, Philadelphia, Pa., acknowledging receipt of the deed but found the signature to the deed had not been properly acknowledged, so he returned the deed. Afterward Mr. Nusbaum received the properly acknowledged deed and accepted the same in good faith, believing at the time that he had been communicating with Chapman, the father of Mrs. Forney. Nusbaum did not notice the allegation in the bill of complaint, but had he seen it he could not have done more

than he did. Certainly he cannot be charged with mala fides as is required under the Virginia law before notice can become effective.

The law in Virginia as to notice is set forth in the case of *Crane's Nest Coal & Coke Co. v. Virginia Iron Coal and Coke Co., et al,* 108 Va. 820, 68 S.E. 954. At page 956 of the Reporter the following language is used by the Court in its opinion:

> "The burden of proving notice to a purchaser for value is on the party alleging it, and, while the effect of notice may be inferred from circumstances as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser and must be so strong and clear as to fix upon him the imputation of mala fides."

To the same effect see *Vicar v. Saylor,* 111 Va. 307, 68 S.E. 988. Therefore, if there was a trust, no notice as required by the law of Virginia has been established.

## IV.

### It Was Error to Hold the Bank Had Notice of the Trust

The District Judge found that the bank did not have notice of the trust at the time of the making of the deed of trust loan on the property, and on page 14 of the opinion of the Court of Appeals (R. 163) it is stated: "The bank also had notice. It was defendant in the foreclosure suit." If this is the only notice that the bank had, the notice came too late, because the funds had already been distributed by the bank at the time of the foreclosure suit, and nothing the bank could have done at this late date would have changed the situation insofar as the bank was concerned.

## V.

### It Was Error to Hold that the Bank Had Not Properly Accounted for the Funds

The only charge against the bank in this connection is that it used the deed of trust note as collateral for loans to some of Forney's numerous corporations. The bank had no notice of the trust. The note was given to the bank as collateral. The evidence shows clearly that Chapman and Mrs. Forney permitted Forney to use the collateral as he saw fit. He, Forney, was clearly the agent for Mrs. Forney and Mr. Chapman. If Mrs. Forney and Mr. Chapman placed into Forney's possession and gave him authority to handle the transaction, and if he handled it wrong insofar as they were concerned, the right of action would be against Forney and not against the innocent bank. The bank got no more in return than it had loaned, and acted in good faith all the way through the transaction; Forney used the deed of trust note as collateral; the bank had no notice of any restrictions as to what it could be used for, and the Court of Appeals in holding that it had notice at the time of the foreclosure sale, was too late to have in any way permitted the bank to rectify that which had already been done by Forney. It is, therefore, clear that the holding of the Court of Appeals in this connection is erroneous.

## VI.

### Strange Development

The Court's attention is called to the following testimon of the respondent Chapman, the father (R. 15).

"Q. 1. Who employed the attorneys to bring this suit that we are now engaged in?

A. I don't know.

Q. 2. Did you have anything to do with it?

A. No.

Q. 3. You didn't employ the attorneys to bring this suit?

A. I have nothing to do with it. If there is any money comes out of it I expect to get some.

Q. 4. Did you finance it?

A. No.

Q. 5. It is not you?

A. It is not I. I put enough money in it already."

It is evident that Forney, the son-in-law, has been the moving force back of all this litigation. He was the one who needed help and got his father-in-law to help him. Then when things do not work out as he had planned, he is the one who tried to establish a trust even unbeknown to Chapman, the then plaintiff. This is really an unheard of type of proceeding, and if there was no proper party plaintiff, the proceeding should have been dismissed.

## VII.

### It Was Error to Fail to Find Forney Was the Agent for Chapman

The Court's attention is respectfully called to Chapman's deposition (R. 12):

"A. Anything that was required to do was done by Mr. Forney. He was the man that did it all. He

was familiar with it. Everything we sent to Forney. He knew what it meant.

Q. Do you mean you sent any letters and the deed to Mr. Forney?

A. The chances are that we did. We were sick of it. We were disgusted.

* * * * *

(R. 14):

Q. I understood you to say that you left everything to Mr. Forney.

A. I lived in Philadelphia. I couldn't do it."

It would be difficult to present a more perfect case of agency. If Forney the agent did mislead his principal, the principal could only look to the agent, unless there was collusion by the agent with some third person, and there is no evidence of anything of that nature occurring in this matter. The Court of Appeals committed error in failing to find that Forney, the negotiator, the planner, was not the agent of Chapman.

## VIII.

### Errors One of Law

The errors complained of herein are one of law. We maintain that the Court of Appeals in rendering its opinion, has misinterpreted the law of Virginia and has not followed the decisions of the Supreme Court of Appeals of Virginia, and we maintain that the Court of Appeals in deciding the particular issues involved herein was bound by the decisions of the Supreme Court of Appeals of Virginia.

## IX.

### Conclusion

The decision in this case is contrary to the law as announced by the Supreme Court of Appeals of Virginia, and if permitted to stand, will leave the law in Virginia in a state of confusion in the following respects: (a) The law as to parol trusts in real estate; (b) the law of estoppel or laches; (c) the law of agency; (d) the law as to notice; and since jurisdiction over this case is on the ground of diversity of citizenship, the law as announced by this Court in the case of *Erie Railroad Co. v. Tompkin,* 304 U.S. 64, is applicable as well as Rule 38(b) of this Court. A writ of certiorari should issue and the judgment below reversed.

Respectfully submitted,

RUSSELL T. BRADFORD
ALVAH H. MARTIN
BERTRAM S. NUSBAUM
*Attorneys for Petitioners*